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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 318

JOHN A. BURNS, Governor of the State of Hawaii,
Appellant,

v.

WILLIAM S. RICHARDSON, *et al.*, *Appellees.*

On Appeal from the United States District Court for the District of Hawaii

OBJECTION OF APPELLANT TO MOTION OF HAROLD S. ROBERTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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Pursuant to Rule 42(3) of the Revised Rules of this Court, Appellant John A. Burns, Governor of the State of Hawaii, hereby files this objection to the Motion of Harold S. Roberts for Leave to File *Amicus Curiae* Brief, filed in this case and in No. 323, *Cravalho et al.* v. *Richardson et al.*

This objection has two bases: (1) that Mr. Roberts demonstrates no interest in this matter of a nature which would justify his participation in it for the first time on appeal, and (2) that the proposed brief annexed to his motion does not indicate that his presence as an *amicus curiae* would contribute to the consideration of the case by the Court.

1. Mr. Roberts made no attempt of any nature to intervene or participate in the proceedings in the District Court. He identifies his interest in this matter as that of a citizen and taxpayer of Hawaii (Motion, p. 1) and that of an expert on Hawaiian reapportionment questions (Motion, pp. 2-3).—This action was brought in the District Court by plaintiffs whose interest was expressly stated to be that of citizens, taxpayers and voters, and had Mr. Roberts thought them inadequate representatives of the class, he could have sought leave to intervene in the District Court, which was most liberal in permitting intervention. Moreover, any expertise which Mr. Roberts has to contribute to the problems of Hawaii's reapportionment would better have been submitted to the District Court by way of expert testimony,[1] where his competency and the subject matter of his testimony would have been subject to examination by the parties and the District Court according to the rules of evidence.

2. An examination of Mr. Robert's proposed *amicus curiae* brief does not indicate that his presentation is likely to make a material substantive contribution to the issues presented.

a. A considerable portion of Mr. Roberts' proposed brief (pp. 2-6) is spent in an effort to demonstrate

[1] Much of the evidence received below was in this form.

that except in certain limited respects the appeals in No. 318 and No. 323 were not timely filed. The only basis on which this claim is made as to No. 318 is that the notice of appeal was filed on May 3, 1965, more than sixty days after the date borne by the first order in question, the District Court's order dated February 17, 1965. See 28 U.S.C. § 2101(b); J.S. p. 1a.

This suggestion is completely without foundation. On March 1, 1965, a Motion to Alter or Amend the Judgment in a most fundamental way was submitted to the District Court.[2] It was certainly "not addressed to 'mere matters of form but raised questions of substance.'" *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944). Under familiar principles even the filing of such a motion tolls the time to appeal. *Leishman* v. *Associated Wholesale Electric Co.*, 318 U.S. 203, 205-06 (1943); *United States* v. *Crescent Amusement Co., supra.* The purpose of the motion was to amend the only coercive portion of the February 17 order, paragraph 4—the heart of the decree. (See J. S. p. 9; pp. 19a-20a)

On March 9, 1965, the court granted the motion and provisionally amended its earlier decree. (J. S. 21a-23a) At this point, the proceedings contemplated by the court's modification of its decree—particularly the permanent reapportionment plan which the legislature

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[2] This motion would have been timely either as a Motion for New Trial (the District Court analogy of a Motion for Rehearing) (Fed. R. Civ. P. 59(a)), or as a Motion to Alter or Amend Judgment (Fed. R. Civ. P. 59(e)), even if the order of February 17 had been entered that day. February 27 was a Saturday. See Fed. R. Civ. P. 6(a). Contrast *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 208-11 (1952).

was to consider[3]—could well have made moot the objections of the Governor to the February 17 order.[4] It is impossible to infer from the Governor's support of the motion any acquiescence in the District Court's February 17 rulings to which the Governor objected, particularly the court's ruling that the Hawaii House of Representatives was constitutionally apportioned. Certainly the Governor never intended to acquiesce, and never indicated any acquiescence in those rulings. In fact, the Governor's memorandum supporting the Motion to Alter or Amend the Judgment expressly stated that his support was "without prejudice to any . . . rights of appeal." (R. 413)

On April 19, 1965, the District Court stayed the coercive part of its order of February 17, 1965, pending its ruling on the bills submitted to it by the Hawaii Legislature. The bills actually submitted, of course, did not make moot the objections which the Governor had registered to the holdings expressed in the order dated February 17.[5] Most fundamentally, the bills

[3] While the provisional plan contemplated by the court's order of March 9 was not to include reapportionment of the House, the permanent plan contemplated by that order was not so limited. (J. S. p. 22a) The District Court later made it perfectly clear that it intended broader issues than the Senate reapportionment *in se* to be taken up in the consideration of the permanent plan. See Opinion of April 28, 1965, J. S. pp. 25a-26a; 35a-36a.

[4] Moreover, the motion was in accordance with the Governor's position that provisional reapportionment could be accomplished by statute.

[5] The Governor had repeatedly objected, for example, to the constitutional propriety of the apportionment of the House prior to the District Court's order dated February 17. See R. 223; 298; 364. The language quoted by Mr. Roberts (Br. pp. 3-4) in agreement with the District Court's order dated February 17 is, of course, from the briefs of certain legislators who were aligned on the side of the litigation opposing the Governor, and was never adopted by the Governor.

provided for reapportionment of the Senate only, both provisionally and permanently. For these and other reasons, including those which led the District Court to reject them, the Governor opposed the bills before the District Court.[6]

Accordingly, since a timely Motion to Alter and Amend the substance of the District Court's February 17 order was filed, and was granted under circumstances which might have led to the mootness of the Governor's objections to the February 17 order, and since essential parts of the February 17 order, including its coercive provision, paragraph 4, were not reinstated until the District Court's order of April 28, 1965, it is clear that the notice of appeal in this matter filed on May 3, 1965, was timely. *Leishman* v. *Associated Wholesale Electric Co., supra; United States* v. *Crescent Amusement Co., supra; Zimmern* v. *United States,* 298 U.S. 167, 169 (1936). Certainly, in terms not only of the form but of the realities of the situation, the finality of the February 17 order was completely suspended by the District Court until April 28, 1965. — Thus, on grounds of substance, it is plain that the appeal was timely as to all the questions presented. Any contrary conclusion would have required the taking of an appeal during the extensive proceedings in the Dis-

[6] The assertion by Mr. Roberts (Br. p. 11) that "appellant supported the legislation submitted to the District Court pursuant to the March 9th Order" is completely contrary to the record as far as the Governor is concerned. In late March, 1965, the Governor submitted to the court a lengthy memorandum in opposition to certain Senate reapportionment legislation then being proposed by the Legislature. (R. 479-92; 530-32) When legislation which contained similar vices was formally submitted to the court on April 14, 1965, the Governor opposed it in the ensuing proceedings before the District Court. Transcript of Proceedings on April 15, 1965, p. 167; Transcript of Proceedings on April 16, 1965, pp. 5-12.

trict Court subsequent to February 17—which involved the filing of numerous pleadings and the receipt of oral and documentary evidence—rather than upon their conclusion. Such a result would obviously contravene the policy against piecemeal appeals.

The appeal was also timely as to all questions on the ground that the notice of appeal was timely filed as computed from the entry of the February 17 order on April 9. Section 2101 of the Judicial Code, on which the present appeal is founded, measures the time for taking appeals from the "entry" of the judgment;[7] but even apart from this the date of entry would govern in a civil appeal: "A [District Court] judgment is effective only . . . when entered as provided in Rule 79(a) [providing for entry in the Civil Docket]." Fed. R. Civ. P. 58. See *United States* v. *Hark,* 320 U.S. 531, 534 (1944).

b. The only substantive question discussed by Mr. Roberts in his proposed *amicus curiae* brief is whether the Hawaii Legislature has the power to enact by statute a provisional plan of reapportionment. (Br. pp. 8-10) These contentions are anticipated in our Jurisdictional Statement, pp. 28-32. — If Mr. Roberts is seeking to suggest (Br. p. 10) that the Hawaii constitutional provisions are unique in imbedding the legislative apportionment scheme in the state constitution, and in requiring that constitutional amendments proposed by the legislature be approved or ratified by the people, and that accordingly this aspect of the appeal does not provide a recurring question, we must,

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[7] This is expressly provided in subsection (a) of Section 2101, although not all of the later subsections, such as subsection (b), repeat it.

however, take this occasion to point out that he is in factual error. For the constitutions of Arizona, Arkansas, Nevada, New Jersey and South Carolina each make provision for a constitutionally-fixed system of apportionment in one house;[8] and those of Maryland, New Mexico and Vermont, like Hawaii's, fix the apportionment of both houses.[9] All eight of these states' constitutions also require ratification of constitutional amendments by the people.[10] Indeed, as we pointed out in our Jurisdictional Statement, this Court has already indicated approval of the technique of adopting a provisional reapportionment scheme by statute in Maryland, a State where the relevant constitutional provisions are strikingly similar to Hawaii's. *Maryland Committee* v. *Tawes,* 377 U.S. 656, 675-76 (1964). (J.S. p. 29)

CONCLUSION

The motion does not disclose any special reason for permitting the movant to file an *amicus curiae* brief, particularly in view of his lack of participation in the case in the District Court; and it does not appear from the proposed brief that any substantive contribution can be made by him.

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[8] See Ariz. Const. art. IV, pt. 2, §1(1); Ark. Const. amend. 45, §3; Nev. Const. art. IV, §5; N. J. Const. art. IV, §2, 1; S. C. Const. art. 3, §6.

[9] See Md. Const. art. III, §§2 and 5; N. M. Const. art. IV, §§3b and c; Vt. Const. art. II, §§13 and 18.

[10] See Ariz. Const. art. IV, pt. 1, §1; Ark. Const. amend. 7, §1; Md. Const. art. XIV, §1, and art. XVI, §1; Nev. Const. art. XVI, §1, and art. XIX, §§ 1 and 2; N. J. Const. art. IX, §§ 1, 4, and 6; N. M. Const. art. XIX, §1; S. C. Const. art. 16, §1; Vt. Const. ch. II, §68.

Accordingly, we urge that the motion for leave to file an *amicus curiae* brief be denied.

Respectfully submitted,

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